RECORD AND BRIEFS

FILED
APR 27 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-299

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,
Petitioner,

v.

U.S. DEPARTMENT OF DEFENSE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENT UTILITY WATER ACT GROUP IN SUPPORT OF PETITIONER

Kristy A. N. Bulleit
Counsel of Record
ANDREW J. TURNER
KARMA B. BROWN
KERRY L. MCGRATH
HUNTON & WILLIAMS LLP
2200 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20037
kbulleit@hunton.com
(202) 955-1500
Counsel for Respondent Utility Water Act Group

April 27, 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

RECEIVED
MAY 1 - 2017
OFFICE OF THE CLERK

QUESTION PRESENTED

The question presented is whether the Sixth Circuit erred when it held that it has jurisdiction under 33 U.S.C. § 1369(b)(1)(F) to decide petitions to review the waters of the United States rule, even though the rule does not "issu[e] or den[y] any permit" but instead defines the waters that fall within Clean Water Act jurisdiction.

CORPORATE DISCLOSURE STATEMENT

The Utility Water Act Group ("UWAG") is an ad hoc, non-profit, unincorporated group composed of individual electric utilities and national trade associations of electric utilities. UWAG's purpose is to participate on behalf of its members in rulemakings under the Clean Water Act and in litigation arising from those rulemakings. UWAG is not a parent, subsidiary, or affiliate of any corporation or other entity that has any outstanding securities in the hands of the public, and no publicly-held company has a 10% or greater ownership interest in UWAG.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

I. Statutory Background 3

II. WOTUS Rulemaking 6

III. Challenges to the Final WOTUS Rule 7

SUMMARY OF ARGUMENT 10

ARGUMENT 11

I. District Court Review of the WOTUS Rule Is Appropriate Given the Context and Structure of § 509(b)(1). 12

II. Limiting the WOTUS Rule to One-Time Circuit Court Review Would Raise Significant Concerns for Potentially Regulated Parties. 16

CONCLUSION 21

TABLE OF AUTHORITIES

Page

Federal Cases:

Chemical Mfrs. Ass'n v. *EPA*, 870 F.2d 177 (5th Cir. 1989) 16

Chrysler Corp. v. *EPA*, 600 F.2d 904 (D.C. Cir. 1979) 20

Eagle-Picher Indus., Inc. v. *EPA*, 759 F.2d 905 (D.C. Cir. 1985) 17

Friends of the Earth v. *EPA*, 333 F.3d 184 (D.C. Cir. 2003) 13

Friends of the Everglades v. *EPA*, 699 F.3d 1280 (11th Cir. 2012) 16

General Elec. Co. v. *EPA*, 53 F.3d 1324 (D.C. Cir. 1995) 19

Hart v. *Massanari*, 266 F.3d 1155 (9th Cir. 2001) 15

Howmet Corp. v. *EPA*, 614 F.3d 544 (D.C. Cir. 2010) 19

In re EPA, 803 F.3d 804 (6th Cir. 2015) 8

In re U.S. Dep't of Def., 817 F.3d 261 (6th Cir. 2016), *cert granted sub nom. Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 137 S. Ct. 811 (2017) 8, 9, 15

League of Wilderness Defs./Blue Mountains Biodiversity Project v. *Forsgren*, 309 F.3d 1181 (9th Cir. 2002) 13

Longview Fibre Co. v. *Rasmussen*, 980 F.2d 1307 (9th Cir. 1992) 12, 13

National Ass'n of Mfrs. v. *Dep't of Def.*, 137 S. Ct. 811 (2017) 10

National Cotton Council v. *EPA*, 553 F.3d 927 (6th Cir. 2009) 9

Northwest Envtl. Advocates v. *EPA*, 537 F.3d 1006 (9th Cir. 2008) 13

Oklahoma ex rel. Pruitt v. *EPA*, No. 15-CV-0381-CVE-FHM, 2016 WL 3189807 (N.D. Okla. Feb. 24, 2016) 8

Precon Dev. Corp. v. *U.S. Army Corps of Eng'rs*, 633 F.3d 278 (4th Cir. 2011) 21

Sackett v. *EPA*, 566 U.S. 120 (2012) 16, 21

U.S. Army Corps. of Eng'rs v. *Hawkes Co.*, 136 S. Ct. 1807 (2016) 16

Washington Cattlemen's Ass'n v. *EPA*, No. 15-3058 (DWF/LIB), 2016 WL 6645765 (D. Minn. Nov. 8, 2016) 8

Wisconsin Res. Prot. Council v. *Flambeau Mining Co.*, 727 F.3d 700 (7th Cir. 2013) 19

Pending Cases:

Blue Water Baltimore, Inc. v. *Pruitt*, No. 17-1258 (4th Cir. filed Feb. 28, 2017) 3

Los Angeles Waterkeeper v. *Pruitt*, No. 17-70570 (9th Cir. filed Feb. 27, 2017) 3

Federal Statutes:

28 U.S.C. § 2112(a)(3) 5, 7

TABLE OF AUTHORITIES

Page

Federal Cases:

Chemical Mfrs. Ass'n v. *EPA*, 870 F.2d 177 (5th Cir. 1989) 16

Chrysler Corp. v. *EPA*, 600 F.2d 904 (D.C. Cir. 1979) 20

Eagle-Picher Indus., Inc. v. *EPA*, 759 F.2d 905 (D.C. Cir. 1985) 17

Friends of the Earth v. *EPA*, 333 F.3d 184 (D.C. Cir. 2003) 13

Friends of the Everglades v. *EPA*, 699 F.3d 1280 (11th Cir. 2012) 16

General Elec. Co. v. *EPA*, 53 F.3d 1324 (D.C. Cir. 1995) 19

Hart v. *Massanari*, 266 F.3d 1155 (9th Cir. 2001) 15

Howmet Corp. v. *EPA*, 614 F.3d 544 (D.C. Cir. 2010) 19

In re EPA, 803 F.3d 804 (6th Cir. 2015) 8

In re U.S. Dep't of Def., 817 F.3d 261 (6th Cir. 2016), *cert granted sub nom. Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 137 S. Ct. 811 (2017) 8, 9, 15

League of Wilderness Defs./Blue Mountains Biodiversity Project v. *Forsgren*, 309 F.3d 1181 (9th Cir. 2002) 13

Longview Fibre Co. v. *Rasmussen*, 980 F.2d 1307 (9th Cir. 1992) 12, 13

National Ass'n of Mfrs. v. *Dep't of Def.*, 137 S. Ct. 811 (2017) 10

National Cotton Council v. *EPA*, 553 F.3d 927 (6th Cir. 2009) 9

Northwest Envtl. Advocates v. *EPA*, 537 F.3d 1006 (9th Cir. 2008) 13

Oklahoma ex rel. Pruitt v. *EPA*, No. 15-CV-0381-CVE-FHM, 2016 WL 3189807 (N.D. Okla. Feb. 24, 2016) 8

Precon Dev. Corp. v. *U.S. Army Corps of Eng'rs*, 633 F.3d 278 (4th Cir. 2011) 21

Sackett v. *EPA*, 566 U.S. 120 (2012) 16, 21

U.S. Army Corps. of Eng'rs v. *Hawkes Co.*, 136 S. Ct. 1807 (2016) 16

Washington Cattlemen's Ass'n v. *EPA*, No. 15-3058 (DWF/LIB), 2016 WL 6645765 (D. Minn. Nov. 8, 2016) 8

Wisconsin Res. Prot. Council v. *Flambeau Mining Co.*, 727 F.3d 700 (7th Cir. 2013) 19

Pending Cases:

Blue Water Baltimore, Inc. v. *Pruitt*, No. 17-1258 (4th Cir. filed Feb. 28, 2017) 3

Los Angeles Waterkeeper v. *Pruitt*, No. 17-70570 (9th Cir. filed Feb. 27, 2017) 3

Federal Statutes:

28 U.S.C. § 2112(a)(3) 5, 7

28 U.S.C. § 2401(a) 18

Clean Water Act, 33 U.S.C. §§ 1251 et seq.

33 U.S.C. § 1251(a) 3

33 U.S.C. § 1281 4

33 U.S.C. § 1311 ..... 4, 8, 19

33 U.S.C. § 1311(a) 4

33 U.S.C. § 1312 ..... 4, 8

33 U.S.C. § 1316 ..... 4, 8

33 U.S.C. § 1317 4

33 U.S.C. § 1319(c)(2) 19

33 U.S.C. § 1319(d) 19

33 U.S.C. § 1329 4

33 U.S.C. § 1342 ..... 4, 8, 9

33 U.S.C. § 1344 5

33 U.S.C. § 1345 ..... 4, 8

33 U.S.C. § 1362(7) 4

33 U.S.C. § 1362(12) 4

33 U.S.C. § 1369(b)(1) 5, 11, 17

33 U.S.C. § 1369(b)(1)(E) 5, 13

33 U.S.C. § 1369(b)(1)(F) 5, 14

33 U.S.C. § 1369(b)(2) 5, 13, 18

Legislative History:

123 Cong. Rec. 26,759-60 (Aug. 4, 1977) 15

H.R. Rep. No. 92-911 (1972), *reprinted in*, S. Comm. on Public Works, 93d Cong., 1st Sess., 1 A Legislative History of the Water Pollution Control Act Amendments of 1972, at 753 (1973) 12

Federal Regulations:

33 C.F.R. § 320.1(a)(6) 20

33 C.F.R. § 328.3(a) 6

33 C.F.R. § 328.3(a)(8) 7

33 C.F.R. § 328.3(b) 6

Federal Register:

Clean Water Rule: Definition of "Waters of the United States"; Final Rule, 80 Fed. Reg. 37,054 (June 29, 2015) 6, 14

Civil Monetary Penalty Inflation Adjustment Rule; Interim Final Rule, 81 Fed. Reg. 43,091 (July 1, 2016) 19, 20

Court Materials:

In re EPA, MCP No. 135 (J.P.M.L. filed July 27, 2015)

- Consolidation Order (July 28, 2015), ECF No. 3 8

In re U.S. Dep't of Def., 817 F.3d 261 (6th Cir. 2016) (No. 15-3751)

- Order (Apr. 21, 2016), ECF No. 92-1 9
- Case Management Order No. 2 (June 14, 2016), ECF No. 99-1 9

Miscellaneous:

U.S. Army Corps of Eng'rs, Regulatory Guidance Letter No. 08-02, Jurisdictional Determinations (June 26, 2008), http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl08-02.0df 20

STATEMENT OF THE CASE

This case presents a recurring question crucial to determining the proper forum for judicial review of Clean Water Act ("CWA") regulations. The challenged rule ("WOTUS Rule" or "Rule"), jointly issued by the U.S. Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") (together, "Agencies"), interprets a key statutory term–"the waters of the United States"–that establishes the geographic scope of the Agencies' jurisdiction for all CWA regulatory programs.

The Agencies' definition of "the waters of the United States" has considerable regulatory consequences for a wide range of industry activities, and its impacts on Utility Water Act Group ("UWAG")[1] member company facilities and activities is enormous. UWAG members operate a range of facilities

---

[1] UWAG is a voluntary, ad hoc, non-profit, unincorporated group of 163 individual energy companies and three national trade associations of energy companies: the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. UWAG's purpose is to participate on behalf of its members in federal agency proceedings under the CWA, and in litigation arising from those proceedings. UWAG members own and operate many types of electric generating facilities, including steam electric power plants, combustion turbines, and hydroelectric facilities, and an increasing array of renewable generation sites, including wind and solar facilities, as well as electric transmission and distribution lines, natural gas and oil distribution lines, and railroad tracks, all of which are critical to meet the energy needs of our country.

that produce, transmit, and distribute electricity nationwide, and each is affected by the Rule in a unique and significant way.

As a result of the Rule, UWAG members' facilities and activities would be newly subject to CWA regulatory jurisdiction for activities on or affecting lands or waters not previously defined as jurisdictional. For example, UWAG members would be required to obtain Corps-issued CWA § 404 permits for discharges of dredged or fill material, or EPA- or State-issued permits under the CWA § 402 National Pollutant Discharge Elimination System ("NPDES") for discharges of other pollutants, to areas not previously deemed to be "waters of the United States." The Rule also triggers new Spill Prevention, Control, and Countermeasure requirements and other CWA § 311 requirements for UWAG members with respect to such newly identified jurisdictional areas.

Thus, UWAG and its members have a significant interest in ensuring that judicial review of the WOTUS Rule occurs in a manner that allows a full opportunity to address the broad impacts and implications of the Rule for all of these programs, and that does not foreclose later judicial review. Treating the WOTUS Rule as one of the discrete actions subject to the consolidated and exclusive appellate review with the condensed deadlines and preclusive effects that § 509(b)(1) requires would prevent the type of review that is critical for such a sweeping and important rule.

Moreover, the significance of this Court's determination regarding the applicability of § 509(b)(1) to a rule defining the geographic scope of federal CWA jurisdiction has implications that transcend the 2015 WOTUS Rule and will likely affect countless future CWA rulemakings. UWAG has experience with a panoply of CWA rulemakings and litigation. The lack of clarity across and within circuits on the threshold issue of jurisdiction over CWA actions has resulted in confusion, inefficiency, and a waste of judicial resources.[2] The Court's determination on where jurisdiction lies for challenges to the WOTUS Rule will guide federal courts in their future application of § 509(b)(1) for other CWA rulemakings, including–but not limited to–future rulemakings to define "the waters of the United States."

I. Statutory Background

The CWA is a comprehensive statute that partners all levels of federal, state, and local government and deploys a number of programs–both regulatory and non-regulatory–to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act prohibits the "discharge of any pollutant" into "navigable

---

[2] Indeed, while this case has been pending, the applicability of § 509(b)(1) has caused similar confusion and inefficiency for recent challenges to EPA's denial of petitions for expanded CWA stormwater permitting in Los Angeles and Maryland under EPA's "residual designation authority." See *Blue Water Baltimore, Inc.* v. *Pruitt*, No. 17-1258 (4th Cir. filed Feb. 28, 2017); *Los Angeles Waterkeeper* v. *Pruitt*, No. 17-70570 (9th Cir. filed Feb. 27, 2017).

that produce, transmit, and distribute electricity nationwide, and each is affected by the Rule in a unique and significant way.

As a result of the Rule, UWAG members' facilities and activities would be newly subject to CWA regulatory jurisdiction for activities on or affecting lands or waters not previously defined as jurisdictional. For example, UWAG members would be required to obtain Corps-issued CWA § 404 permits for discharges of dredged or fill material, or EPA- or State-issued permits under the CWA § 402 National Pollutant Discharge Elimination System ("NPDES") for discharges of other pollutants, to areas not previously deemed to be "waters of the United States." The Rule also triggers new Spill Prevention, Control, and Countermeasure requirements and other CWA § 311 requirements for UWAG members with respect to such newly identified jurisdictional areas.

Thus, UWAG and its members have a significant interest in ensuring that judicial review of the WOTUS Rule occurs in a manner that allows a full opportunity to address the broad impacts and implications of the Rule for all of these programs, and that does not foreclose later judicial review. Treating the WOTUS Rule as one of the discrete actions subject to the consolidated and exclusive appellate review with the condensed deadlines and preclusive effects that § 509(b)(1) requires would prevent the type of review that is critical for such a sweeping and important rule.

Moreover, the significance of this Court's determination regarding the applicability of § 509(b)(1) to a rule defining the geographic scope of federal CWA jurisdiction has implications that transcend the 2015 WOTUS Rule and will likely affect countless future CWA rulemakings. UWAG has experience with a panoply of CWA rulemakings and litigation. The lack of clarity across and within circuits on the threshold issue of jurisdiction over CWA actions has resulted in confusion, inefficiency, and a waste of judicial resources.[2] The Court's determination on where jurisdiction lies for challenges to the WOTUS Rule will guide federal courts in their future application of § 509(b)(1) for other CWA rulemakings, including–but not limited to–future rulemakings to define "the waters of the United States."

I. Statutory Background

The CWA is a comprehensive statute that partners all levels of federal, state, and local government and deploys a number of programs–both regulatory and non-regulatory–to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act prohibits the "discharge of any pollutant" into "navigable

---

[2] Indeed, while this case has been pending, the applicability of § 509(b)(1) has caused similar confusion and inefficiency for recent challenges to EPA's denial of petitions for expanded CWA stormwater permitting in Los Angeles and Maryland under EPA's "residual designation authority." See *Blue Water Baltimore, Inc.* v. *Pruitt*, No. 17-1258 (4th Cir. filed Feb. 28, 2017); *Los Angeles Waterkeeper* v. *Pruitt*, No. 17-70570 (9th Cir. filed Feb. 27, 2017).

waters" except in compliance with specified provisions of the statute, including those requiring a permit. *Id.* §§ 1311(a), 1362(12). The Act defines "navigable waters" as "the waters of the United States, including the territorial seas." *Id.* § 1362(7).

EPA and States with delegated authority issue NPDES permits under 33 U.S.C. § 1342, which authorize and control discharges of pollutants into waters of the United States. NPDES permits must ensure compliance with a variety of effluent limitations and other limitations, including, *inter alia*, requirements promulgated or approved by EPA under 33 U.S.C. §§ 1311 (effluent limitations guidelines), 1312 (water quality limitations), 1316 (new source performance standards), 1317 (toxic standards), and 1345 (limitations for disposal or use of sewage sludge).

EPA's administration of the NPDES program is not the only method Congress established to meet the goals of the Act. The Act authorized billions of dollars in federal assistance for the construction of municipal sewage treatment plants to end a principal cause of water pollution–the discharge of raw sewage into our Nation's waterways. *Id.* § 1281. The Act also includes separate programs for "nonpoint sources" of pollution, *id.* § 1329, and a host of other research and pollutant-specific programs.

Of particular importance for the WOTUS Rule, which was jointly issued by EPA and the Corps to amend regulations that separately implement each of the Agencies' individual CWA regulatory programs, is the regulation of discharges of dredged or

fill material administered by the Corps, *id.* § 1344. EPA is thus only one of the federal agencies charged with administering the CWA. Other federal agencies, such as the Corps and the U.S. Coast Guard, also have significant and independent responsibilities under the Act, as do the States.

Of the many actions States, EPA, the Corps, and the U.S. Coast Guard are empowered to take, CWA § 509(b)(1) provides the courts of appeals with original jurisdiction over only actions performed by the *EPA Administrator* and, of those, over only seven categories of EPA action. 33 U.S.C. § 1369(b)(1). The EPA actions subject to review under § 509(b)(1) include "approving or promulgating any effluent limitation or other limitation under [CWA §§ 301, 302, 306, or 405]," *id.* § 1369(b)(1)(E), and actions "issuing or denying any permit under [CWA § 402]." *Id.* § 1369(b)(1)(F).

Section 509(b)(1), 33 U.S.C. § 1369 (b)(1), sets a 120-day statute of limitations for petitions seeking judicial review; 28 U.S.C. § 2112(a)(3) provides for consolidation of such petitions; and § 509(b)(2), 33 U.S.C. § 1369(b)(2), precludes later review in civil or criminal proceedings of any EPA action reviewable under § 509(b)(1). Thus, any party who wishes to challenge one of EPA's actions subject to § 509(b)(1) must file that challenge within 120 days of publication of the final action, will face consolidation of that action with other challenges (thus substantially limiting that party's ability to present its own claims), and will face claim preclusion after final review of the petitions.

II. WOTUS Rulemaking

On June 29, 2015, EPA and the Corps finalized a rule that purports to "clarif[y] the scope of 'waters of the United States'" for purposes of all CWA programs. Clean Water Rule: Definition of "Waters of the United States"; Final Rule, 80 Fed. Reg. 37,054 (June 29, 2015). The WOTUS Rule identifies broad categories of waters that are subject to CWA jurisdiction by rule, narrow categories of waters that are not subject to CWA jurisdiction, and two categories of isolated waters that may be jurisdictional if a site-specific analysis determines that they possess a "significant nexus" to certain types of jurisdictional waters. *Id.* at 37,104-06.

Waters subject to CWA jurisdiction by rule include: (1) traditional navigable waters, (2) interstate waters, (3) territorial seas, (4) impoundments of waters of the United States, (5) certain tributaries, and (6) waters "adjacent" to the waters in the preceding five categories. 33 C.F.R. § 328.3(a).

Waters excluded from federal regulatory jurisdiction include waste treatment systems, prior converted cropland, certain drainage ditches, artificially irrigated areas, swimming or reflecting pools, ornamental waters, artificial lakes and ponds, farm and stock watering ponds, cooling ponds, settling basins, water-filled depressions incidental to mining or construction activity, puddles, subsurface drainage systems, stormwater control features, and certain wastewater recycling structures. *Id.* § 328.3(b).

Waters that are subject to jurisdiction based on a case-specific significant nexus determination include: (A) waters, any part of which are within the 100-year floodplain of a traditional navigable water, interstate water, or territorial sea; and (B) waters, any part of which are within 4,000 feet of the ordinary high water mark of any of those jurisdictional waters, any impoundment of jurisdictional waters, or any covered tributary. *Id.* § 328.3(a)(8).

III. Challenges to the Final WOTUS Rule

Immediately following the Agencies' publication of the WOTUS Rule, numerous interested parties, including 53 environmental and industrial organizations and 31 States, filed complaints challenging the validity of the rule in multiple federal district courts[3] and (often protective) petitions for review in federal appellate courts.[4]

UWAG protectively filed its original petition in the U.S. Court of Appeals for the Fifth Circuit. The Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 2112(a)(3), consolidated UWAG's petition, along with twelve other petitions for review in eight different courts of appeals, and transferred

---

[3] District of Arizona, Northern District of California, District of the District of Columbia, Northern District of Florida, Northern and Southern Districts of Georgia, District of Minnesota, District of North Dakota, Southern District of Ohio, Northern District of Oklahoma, Southern District of Texas, Western District of Washington, Northern District of West Virginia.

[4] Second, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and District of Columbia Circuits.

them to the Sixth Circuit. Consolidation Order, *In re EPA*, MCP No. 135 (J.P.M.L. July 28, 2015), ECF No. 3.

In response to petitioners' motions for a preliminary stay of the Rule, the Sixth Circuit, on October 9, 2015, granted a motion to stay the WOTUS Rule nationwide, pending a determination regarding whether the "litigation is properly pursued in [the Sixth Circuit] or in the district courts." *In re EPA*, 803 F.3d 804, 806 (6th Cir. 2015).

On February 22, 2016, the Sixth Circuit issued a fractured decision with respect to whether it has jurisdiction to review the WOTUS Rule under § 509.[5] The court concluded that it had exclusive jurisdiction to decide the challenges to the WOTUS Rule. *In re U.S. Dep't of Def.*, 817 F.3d 261 (6th Cir. 2016), *cert. granted sub nom. Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 137 S. Ct. 811 (2017). Judge McKeague found that the WOTUS Rule is subject to circuit court review under both CWA § 509(b)(1)(E) (review of EPA action approving or promulgating any effluent limitation or other limitation under 33 U.S.C. §§ 1311, 1312, 1316, or 1345) and (F) (review of EPA action in issuing or denying any permit under 33 U.S.C. § 1342). *Id.* at 266-74. Judge Griffin found that the WOTUS Rule is

---

[5] Following the Sixth Circuit's decision, the U.S. District Court for the Northern District of Oklahoma and the U.S. District Court for the District of Minnesota declined jurisdiction. *Oklahoma ex rel. Pruitt* v. *EPA*, No. 15-CV-0381-CVE-FHM, 2016 WL 3189807 (N.D. Okla. Feb. 24, 2016); *Wash. Cattlemen's Ass'n* v. *EPA*, No. 15-3058 (DWF/LIB), 2016 WL 6645765 (D. Minn. Nov. 8, 2016).

not an "effluent limitation or other limitation" under § 509(b)(1)(E), but concurred that the circuit courts have jurisdiction over the WOTUS Rule under § 509(b)(1)(F) (review of EPA action in issuing or denying any permit under 33 U.S.C. § 1342) only because he determined that the panel was bound by prior Sixth Circuit precedent, *National Cotton Council* v. *EPA*, 553 F.3d 927 (6th Cir. 2009). *Id.* at 275 (Griffin, J., concurring) Judge Griffin dedicated his opinion to explaining why *National Cotton Council* was incorrectly decided and why § 509(b)(1)(F) should not apply because the WOTUS Rule is not an action issuing or denying a permit under 33 U.S.C. § 1342. Judge Keith dissented, joining Judge Griffin in finding § 509(b)(1)(E) inapplicable, and concluding that *National Cotton Council* does not require a finding that the WOTUS Rule is subject to circuit court review under § 509(b)(1)(F). *Id.* at 283-84 (Keith, J., dissenting).

UWAG, along with other petitioners, filed a petition for rehearing *en banc*. The Sixth Circuit denied rehearing and set a briefing schedule on the merits. Order, *In re U.S. Dep't of Def.*, No. 15-3751 (6th Cir. filed Apr. 21, 2016), ECF No. 92-1; Case Management Order No. 2, *In re U.S. Dep't of Def.*, No. 15-3751 (6th Cir. June 14, 2016), ECF No. 99-1. On September 2, 2016, the National Association of Manufacturers ("NAM") filed a petition for writ of certiorari seeking Supreme Court review of the Sixth Circuit's decision that it has original jurisdiction over challenges to the WOTUS Rule. UWAG joined a Respondent brief in support of NAM, filed October 7,

2016, and on January 13, 2017, the Supreme Court granted certiorari. *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 137 S. Ct. 811 (2017).

SUMMARY OF ARGUMENT

Section 509(b)(1) provides for immediate circuit court review for a specific set of discrete EPA actions. In light of the precise language used by Congress in that provision, as well as the "peculiar sting" associated with the stringent limitations Congress placed on review of those specific categories of EPA actions subject to § 509(b)–namely, direct circuit court review, the potentially preclusive effect of that review, and the 120-day window within which to bring challenges–courts have counseled against the expansive application of § 509(b)(1). Indeed, given the context and structure of § 509(b)(1), district court review is particularly appropriate for the WOTUS Rule, a joint rule of broad applicability that establishes geographic CWA jurisdiction for all CWA regulatory programs.

Moreover, limiting the WOTUS Rule to direct circuit court review under § 509(b)(1) would raise significant due process concerns. A landowner can have certainty that a particular land or water feature is or is not a "water of the United States" only if he or she seeks a jurisdictional determination or permit from the Agencies. Because the exact scope and applicability of the WOTUS Rule will not become clear without facts regarding a particular feature at issue and the Agencies' interpretation of the applicability of the Rule to that feature, potentially regulated par-

ties have no particularized notice that an area on their site could be subject to the Rule.

Accordingly, this Court should reverse the judgment of the Court of Appeals, and hold that the WOTUS Rule is not subject to § 509(b)(1) and must be challenged in the district courts.

ARGUMENT

EPA and the Corps issued a joint rule defining the pivotal phrase "the waters of the United States" on which CWA jurisdiction turns. The Rule does not fall within any of the seven narrowly drawn categories of EPA action that CWA § 509(b)(1), 33 U.S.C. § 1369(b)(1), commits to the circuit courts for review. Rather, jurisdiction to review the validity of the Rule rests exclusively in the district courts.

In support of the petition, the States and Petitioner provided detailed analyses of § 509(b)(1), which we join. Those analyses demonstrate that neither § 509(b)(1)(E) nor (F) applies to the WOTUS Rule. UWAG adopts in full the States' and NAM's arguments, and does not repeat them here.[6]

In light of the considerable regulatory consequences that the applicability of § 509(b)(1) to a variety of CWA actions has for UWAG members, UWAG

---

[6] The Sixth Circuit held that the WOTUS Rule was not an "effluent or other limitation," so although review of § 509(b)(1)(E) is not necessarily part of the question presented here, the States and Petitioner have demonstrated that provision would not provide circuit court jurisdiction over the WOTUS Rule.

writes this separate brief to provide its singular perspective on why jurisdiction to review the WOTUS Rule properly lies in the district courts.

I. District Court Review of the WOTUS Rule Is Appropriate Given the Context and Structure of § 509(b)(1).

Section 509(b)(1) creates an exception to the general rule that agency actions implementing the CWA are reviewable in federal district court. That exception applies only to a specific, enumerated set of discrete EPA actions that comprise a narrow slice of the overall CWA framework. Congress adopted § 509(b)(1) to "establish a clear and orderly process for judicial review" of those EPA actions to which it applies, and was careful to explain that "the inclusion of section 509 is not intended to exclude judicial review under other provisions of the legislation that are otherwise permitted by law." H.R. Rep. No. 92-911, at 136 (1972), *reprinted in* S. Comm. on Public Works, 93d Cong., 1st Sess., 1 A Legislative History of the Water Pollution Control Act Amendments of 1972, at 753, 823 (1973).

Consistent with this Congressional intent, courts have recognized that the specificity of § 509(b)(1)'s plain language demonstrates that agency actions not clearly falling within the certain, limited categories of § 509(b)(1) are not subject to original review in the courts of appeals. *Longview Fibre Co.* v. *Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992) ("The specificity and precision of [§ 509], and the sense of it, persuade us that it is designed to exclude" EPA actions that

Congress did not specify.); *Friends of the Earth* v. *EPA*, 333 F.3d 184, 193 (D.C. Cir. 2003).

Moreover, in light of § 509(b)(2)'s restriction that actions subject to circuit court review under § 509(b)(1) "shall not be subject to judicial review in any civil or criminal proceeding for enforcement," 33 U.S.C. § 1369(b)(2)–which could be asserted by the Agencies to foreclose jurisdiction over as-applied challenges that raise issues for which review could have been sought within 120 days of promulgation–the Ninth Circuit has noted that reviewability under § 509(b)(1) "carries a peculiar sting." *Longview Fibre Co.*, 980 F.2d at 1313.

Given the precise language of § 509(b)(1) and the "peculiar sting" of its application, courts have "'counseled against [its] expansive application.'" *Nw. Envtl. Advocates* v. *EPA*, 537 F.3d 1006, 1015 (9th Cir. 2008) (quoting *League of Wilderness Defs./Blue Mountains Biodiversity Project* v. *Forsgren*, 309 F.3d 1181, 1190 n.8 (9th Cir. 2002)).

In light of the structure and context of § 509(b)(1), it is appropriate that Congress provided for direct circuit court review of only seven specific categories of EPA actions in § 509(b)(1). Those specific EPA actions are discrete, and are of a nature that Congress's choice to direct appellate review with preclusive effects stands to reason. The enumerated EPA actions include actions "in approving or promulgating any effluent limitation or other limitation" under CWA sections 301, 302, 306, or 405, § 509(b)(1)(E), 33 U.S.C. § 1369(b)(1)(E), and EPA actions in "issu-

ing or denying any permit under section 1342," § 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F). For each of these categories of EPA action, it is clear who is regulated, and each regulated party or category of parties has clear and specific notice of the limits, restrictions, and/or standards to which they are subject, or the authorizations they have or have not received. For that narrow category of enumerated EPA actions, the action and its import are relatively precise, and additional factual development or analysis is not necessary to determine applicability. Accordingly, Congress appropriately determined that one-time, immediate circuit court review is adequate for such actions.

Conversely, in light of § 509(b)(1)'s structure and context, it is equally evident that § 509(b)(1) is inapplicable to the WOTUS Rule. The Rule interprets a keystone statutory term that applies broadly to all CWA regulatory programs. 80 Fed. Reg. at 37,054, 37,102. It neither narrowly restricts discharges or other activities, nor determines whether or on what terms EPA may issue a permit. Rather, it broadly determines where the Act applies. It is a statutory predicate to needing any permit, not the issuance or denial of a permit. And it is a predicate determined by Congress, not EPA.

Whether the Rule's definition of "the waters of the United States" applies to a specific water feature depends on the facts and characteristics of that fea-

ture.[7] As such, review of the joint Corps and EPA WOTUS Rule is proper in the district courts–where all of the case law addressing the key CWA term "the waters of the United States" has originated.

It would be inappropriate to ignore Congress's carefully crafted provisions in § 509 simply to further judicial efficiency. In fact, during the 1977 CWA amendment discussions, when Congress considered selecting the D.C. Circuit as the appropriate venue for review of all § 509(b)(1) actions, many members spoke out against such centralization and argued that the CWA's judicial provision should not "dictate uniformity" or "destroy the diversity of the judicial system." 123 Cong. Rec. 26,759-60 (Aug. 4, 1977) (statement of Sen. McClure). Extending § 509(b)(1) jurisdiction to encompass the key jurisdictional definition in the WOTUS Rule, in order to avoid multiple district court rulings, would have the very effect Congress sought to avoid.

The federal judicial system is well equipped to handle consideration of complex legal issues by multiple district courts. Often, the views of multiple courts are important for developing and considering different views, and ensuring the well-informed development of the law. See *Hart* v. *Massanari*, 266 F.3d 1155, 1173 (9th Cir. 2001). Moreover, it is

---

[7] As Judge Griffin pointed out, to interpret a definitional rule like the WOTUS Rule to be subject to one-time circuit court review under § 509(b)(1)(F) would essentially require § 509(b)(1) review of *all* CWA rules. *In re U.S. Dep't of Def.*, 817 F.3d at 282 (Griffin, J., concurring).

common for district courts to review regulations of broad applicability. See, *e.g.*, *Friends of the Everglades* v. *EPA*, 699 F.3d 1280, 1288 (11th Cir. 2012) (review of water transfer rule proper in district court); *Chem. Mfrs. Ass'n* v. *EPA*, 870 F.2d 177, 265-66 (5th Cir. 1989) (EPA decision to reserve certain pollutants for future technology-based rulemaking held reviewable only in a district court).

Review of the WOTUS Rule, which broadly establishes geographic CWA jurisdiction for all CWA programs, is appropriate in district court. To hold otherwise would ignore the context and structure of the statute, and would sidestep Congress's division of jurisdiction between the courts.

II. Limiting the WOTUS Rule to One-Time Circuit Court Review Would Raise Significant Concerns for Potentially Regulated Parties.

The WOTUS Rule is different from the narrow list of EPA actions subject to circuit court review under § 509(b)(1) because it establishes geographic CWA jurisdiction for all CWA programs. As Justices Kennedy, Thomas, and Alito have noted, "the Act's reach is 'notoriously unclear' and the consequences to landowners even for inadvertent violations can be crushing." *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring); see also *Sackett* v. *EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring). As such, the need to avoid the serious due process issues and other "crushing" consequences that would result if

§ 509(b)(1) is held to apply to the WOTUS Rule outweighs any concerns that judicial inefficiency or chaos may result from review of the WOTUS Rule in multiple district courts.

As noted above, the applicability–or not–of § 509(b)(1) is of critical importance because, if the Rule is deemed to fall under § 509(b)(1), any party seeking to challenge the Rule must file its petition in the court of appeals within 120 days after the promulgation of the rule, or after 120 days "only if such application is based solely on grounds which arose after such 120th day." 33 U.S.C. § 1369(b)(1). A party that does not file a petition for review within that time period may be barred from later challenging review of the rule.[8] In addition to the 120-day statute of limitations, § 509(b)(2) adds a further restriction, which could be asserted by the Agencies to foreclose jurisdiction over as-applied challenges that raise is-

---

[8] At least one circuit, applying essentially the same limitation in § 113(a) of the Comprehensive Environmental Response, Compensation and Liability Act, has held that petitions to review actions subject to such a provision must be brought within the prescribed time period even if those potentially affected are uncertain whether the issues raised are ripe for review. *Eagle-Picher Indus., Inc.* v. *EPA*, 759 F.2d 905 (D.C. Cir. 1985). The court noted that "[P]etitioners who delay filing requests for review on their own assessment of when an issue is ripe for review do so at the risk of finding their claims time-barred." *Id.* at 909.

sues for which review could have been sought within 120 days of promulgation. *Id.* § 1369(b)(2).[9]

Section 509(b)'s "peculiar sting," as the Ninth Circuit has called it, would apply with even greater force here because the challenged rule has broad applicability and purports to define the scope of CWA jurisdiction. The WOTUS Rule affords no particularized notice that a landowner's site is subject to the rule, and it provides no specific record and/or basis for reviewing whether the Rule's definition of "the waters of the United States" applies to a particular water feature. The terminology used to define each of the WOTUS Rule's categories of jurisdictional waters and exclusions is ambiguous and subject to varying potential interpretations as applied to particular water features. The Rule is distinct from the enumerated EPA actions subject to circuit court review under § 509(b)(1) because, without facts regarding the water feature at issue and the Agencies' interpretation regarding whether the Rule supports assertion of CWA jurisdiction over that feature (*i.e.*, through a jurisdictional determination ("JD") or permit received from the Corps or EPA), the Rule's impact is unclear. If circuit court review of the Rule is mandated, a landowner or project proponent who may have no knowledge of how the Rule would apply to that land or project could be barred from judicial review. Such a result would be particularly inappro-

---

[9] By contrast, APA challenges are subject to a six-year statute of limitations, 28 U.S.C. § 2401(a), and that limitation does not preclude later as-applied challenges to a rule.

priate because CWA jurisdiction will remain uncertain in many places until the Agencies actually apply the Rule.

Foreclosing later challenges to the WOTUS Rule would violate basic due process principles: "Informed by basic principles of due process, it is a cardinal rule of administrative law that a regulated party must be given fair warning of what conduct is prohibited or required of it." *Wis. Res. Prot. Council* v. *Flambeau Mining Co.*, 727 F.3d 700, 707 (7th Cir. 2013) (internal quotation marks omitted). The D.C. Circuit has explained that "[i]n the absence of notice–for example, where the regulation is not sufficiently clear to warn a party about what is expected of it–an agency may not deprive a party of property by imposing civil or criminal liability." *Gen. Elec. Co.* v. *EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995). In determining whether a party received fair notice, courts frequently look to the regulations and other agency guidance to determine whether "a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform . . . ." *Howmet Corp.* v. *EPA*, 614 F.3d 544, 553-54 (D.C. Cir. 2010).

The threat of foreclosing future judicial review is severe because the CWA is a strict liability statute. It *prohibits* all non-permitted "discharges" into statutory "navigable waters." 33 U.S.C. § 1311. Violations are subject to civil and criminal penalties of up to $51,470 per day per violation, and imprisonment for up to three years. 33 U.S.C. § 1319(c)(2), (d); 81

Fed. Reg. 43,091, 43,095 (July 1, 2016). The WOTUS Rule leaves certain boundaries of CWA jurisdiction uncertain, and subject to case-by-case judgment by the Agencies. Today, without a formal determination regarding the presence or absence of waters of the United States on a particular parcel, a landowner or project proponent may not know whether a proposed activity is subject to the CWA.[10]

If § 509(b)(1) is broadly interpreted to require one-time circuit court review of the WOTUS Rule, the Rule could be enforced against private parties who may face the argument that they are precluded from challenging the validity of the Rule due to a failure to seek immediate review. "The nagging presence of a substantial due process question indicates, . . . at the very least, the propriety of a narrow interpretation of" the jurisdictional statute. *Chrysler Corp.* v. *EPA*, 600 F.2d 904, 913 (D.C. Cir. 1979).

---

[10] For the CWA § 404 program, a Corps determination may be sought to establish whether a particular parcel of land contains jurisdictional waters, and if so, where those waters begin and end. 33 C.F.R. § 320.1(a)(6). But there is no analogous process for obtaining determinations regarding the presence or absence of waters of the United States for other CWA regulatory programs. And the Corps has previously stated that the Corps' JD process cannot be used to determine the presence of waters of the United States for the purpose of other CWA regulatory programs. U.S. Army Corps of Eng'rs, Regulatory Guidance Letter No. 08-02, Jurisdictional Determinations (June 26, 2008), http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl08-02.pdf. Even for instances where landowners can seek jurisdictional determinations for their parcels, the Corps' JD process often takes longer than the 120-day window provided by § 509(b)(2).

There is no question that a whole host of parties will now be subject to regulation where they were previously excluded. But the exact scope of the Rule and its application may not become clear for some time. Precluding later judicial review would deny those parties of their significant due process rights and could have "crushing" consequences.

Addressing the myriad aspects and implications of the Rule can be achieved only by review in the district courts. Indeed, the need to understand whether a particular area is a "water of the United States" is at the very heart of many permitting challenges and enforcement actions that arise in the district courts. See, *e.g.*, *Sackett* v. *EPA*, 566 U.S. 120 (2012); *Precon Dev. Corp.* v. *U.S. Army Corps of Eng'rs*, 633 F.3d 278 (4th Cir. 2011).

In light of these significant concerns, the WOTUS Rule is distinguishable from the narrow list of EPA actions subject to circuit court review under § 509(b)(1), and the importance of district court review for a rule of this type outweighs any concerns regarding the inconvenience or chaos that may result from review of the WOTUS Rule in multiple district courts.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

April 27, 2017

Respectfully submitted,

Kristy A. N. Bulleit
Counsel of Record
ANDREW J. TURNER
KARMA B. BROWN
KERRY L. MCGRATH
HUNTON & WILLIAMS LLP
2200 PENNSYLVANIA AVE., N.W.
WASHINGTON, D.C. 20037
kbulleit@hunton.com
(202) 955-1500
Counsel for Respondent
Utility Water Act Group